



Washington, D.C. 20505

LEG CHRONO

OLL 85-1850

19 June 1985

Mr. Rick Cinquegrana  
Deputy Counsel for  
Intelligence Policy & Review  
Department of Justice  
Washington, D.C. 20530

Dear Rick:

I am enclosing talking points we have prepared with respect to the Moynihan amendment, a copy of the State Department letter sent to Chairman Lugar, and also a copy of the amendment itself.

The Agency would greatly appreciate the Department's assistance in defeating this bill; specifically, a letter from the Department to Senator Lugar in opposition to the Moynihan bill would be most helpful.

Sincerely,



Legislation Division  
Office of Legislative Liaison

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Enclosures  
as stated

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United States Department of State  
Washington, D.C. 20520

May 10, 1985

Dear Mr. Chairman:

Thank you for your letter of January 24, 1985 to the Secretary requesting comments on S. 12, a bill "to protect communications among Americans from interception by foreign governments, and for other purposes," introduced by Senator Moynihan on January 3, 1985.

As the Committee is aware, the carrying out of unlawful electronic surveillance activities by official or unofficial representatives or agents of foreign governments and other foreign entities in the United States is a matter of serious concern to the United States Government. Responsible agencies of our Government expend considerable resources and effort to detect, monitor and counter such surveillance.

We do not believe that it would be conducive to such efforts to enact a law requiring the President to make information in his possession regarding foreign surveillance activities in the United States -- information often the highest sensitivity -- known to any persons outside the responsible for oversight of such agencies. In particular, so informing a representative of the foreign power responsible for the surveillance (section 3 (c)) would in many if not most cases create a serious risk to intelligence sources and methods. While the bill does provide a "sources and methods" exception to the requirement that the foreign representative be informed, the sensitivity involved in the detection, monitoring and countering of foreign electronic surveillance is such that it is desirable to preserve maximum flexibility for the actions of the President in this area. If the President determines that the national security interest favors informing a representative of the foreign power responsible, he has ample discretion to do so.

We believe, in fact, that the preservation of his

The Honorable  
Richard G. Lugar,  
Chairman, Committee on Foreign Relations,  
United States Senate.

discretion in this regard is consistent with the constitutionally founded "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations ..." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). See also Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring; Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948)).

Section 3(d) of the bill raises, from the viewpoint of the Department of State, even more serious constitutional concerns. The President's authority over the conduct of diplomatic relations with foreign governments, grounded in Article II, Section 3 of the Constitution, necessarily includes the unrestricted power to decide upon matters such as the declaration of foreign diplomatic representatives to be persona non grata. Under existing law, including Article 9 of the Vienna Convention on Diplomatic Relations (23 UST 3227; TIAS 7502), the President has the necessary authority to take such a step, when, in his view, all relevant circumstances warrant. In practice the U.S. government has not been hesitant to declare foreign diplomats persona non grata or otherwise arrange for their departure from the United States when such representatives have been detected engaging in espionage, including electronic surveillance. At the same time, in addition to the constitutional factors cited above, consideration of effective foreign and counter-intelligence policies demand that the President's authority in this area be untrammelled by legislative restrictions.

For these reasons, the Department of State cannot support S.12. The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

With best wishes,

Sincerely,

William L. Ball, III  
Assistant Secretary  
Legislative and Intergovernmental Affairs

June 7, 1985

## CONGRESSIONAL RECORD — SENATE

S 7767

original scholarship bill share this view.

I am not, Mr. President, advocating that we should authorize moneys to educate those of limited means in developing countries, while drastically reducing benefits for students at home. As it turns out, however, we do not face this problem, because some \$14 million has already been authorized as part of last year's continuing resolution to finance the Scholarship Program recommended by the Kissinger Commission over a 5-year period.

I believe the intrinsic merit of this legislation, the economic and political benefits that we will derive, and the existing availability of funds commend its passage. The Scholarship Program will not only fill a gap in our current assistance efforts in the areas of advanced education and technical training of people from the developing world, it will also enhance the effectiveness of our foreign policies.

In conclusion, Mr. President, I thank the senior Senator from Maryland for his leadership and guidance on this matter, and I thank the members of the Foreign Relations Committee for their cooperation.

Mr. President, this is a noncontroversial amendment. I understand that it is acceptable to the majority and the minority. Senator MATHIAS, who is a prime sponsor of this measure, is agreeable to it.

Mr. LUGAR. Mr. President, the distinguished Senator from New Mexico is correct. We commend the amendment and believe it is a distinct improvement on the text in the bill. We appreciate his offering it today.

Mr. PELL. Mr. President, this is a very good amendment which better meets the problem that is often posed when people come here on scholarships and then stay on with no penalty. This increases the penalty, and I trust that it will be approved.

The PRESIDING OFFICER. Is there further debate? If not, the question is on agreeing to the amendment.

The amendment (No. 284) was agreed to.

Mr. MOYNIHAN. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. BINGAMAN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

## AMENDMENT NO 285

(Purpose: To protect communications among Americans from interception by foreign governments, and for other purposes)

Mr. MOYNIHAN. Mr. President, I send to the desk an amendment and ask for its immediate consideration.

The PRESIDING OFFICER. Is there objection to the amendment being in order at this time?

Without objection, it is so ordered. The amendment will be stated.

The legislative clerk read as follows:

The Senator from New York (Mr. MOYNIHAN) proposes an amendment numbered 285.

Mr. MOYNIHAN. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place in the bill, insert the following new title: "Foreign Surveillance Prevention Act of 1985."

SEC. 1. The Congress finds that—

(1) the widespread use of electronic surveillance and the interception of telecommunications by foreign governments pose a serious threat both to the national security of the United States and to the rights of privacy and association guaranteed to Americans by the Constitution;

(2) that such electronic intelligence activities by foreign governments have been, and are being, carried on under the guise of normal diplomatic relations with the United States; and

(3) that the President of the United States, constitutionally charged with the conduct of the Nation's foreign relations and with the protection of the Constitution of the United States, has the primary responsibility to protect the rights and interests of American citizens as they may be jeopardized by the electronic intelligence activities of foreign powers.

SEC. 2. Whenever the President of the United States has reason, based upon information in his possession, to believe that in any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States, any individual on whom diplomatic immunity has been conferred by the United States, is willfully engaging in electronic surveillance on behalf of a foreign power, the President shall—

(a) so inform the Chairman and ranking minority member, or, in his discretion, the members of the Committee on the Judiciary of the House of Representatives, the Committee on the Judiciary of the Senate, the Select Committee on Intelligence of the Senate, and the Select Committee on Intelligence of the House of Representatives;

(b) so inform those persons, if any, reasonably believed to be particular targets of such surveillance in order that they may take such precautions as they consider advisable, unless he shall determine that to do so would seriously compromise sources or methods of intelligence gathering the United States;

(c) so inform the Ambassador or Charge d'Affairs or other representative of such foreign power, and shall demand that such foreign power immediately cease such surveillance, unless he shall determine that to do so would seriously compromise sources or methods of intelligence gathering by the United States; and

(d) thirty days after such demand is made, if the electronic surveillance has not ceased, declare such individual to be persona non grata in the United States, and shall demand that he leave the United States immediately, unless the President shall determine that to do so would cause serious damage to the national security of the United States.

SEC. 3. Definitions.—As used in this Act—

(a) "electronic surveillance" means the interception of wire or radio communications through the use of any electronic, mechanical, or other device;

(b) "wire or radio communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, radio, cable, or other like connection between the point of origin and the

point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(c) "person" means any individual, partnership, association, joint stock company, trust, or corporation;

(d) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or radio communication other than any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business;

(e) "foreign power" means—

(i) a foreign government or any component thereof, whether or not recognized by the United States;

(ii) a faction of a foreign nation or nations, not substantially composed of United States persons;

(iii) an entity, which is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(iv) a foreign-based political organization, not substantially composed of United States persons; or

(v) an entity which is directed and controlled by a foreign government or governments; and

(f) "common carrier" shall have the same meaning which is given the term by section 153(h) of title 47 of the United States Code.

Mr. MOYNIHAN. Mr. President, this is legislation which I have introduced to the Senate in 1977 and 1983 and again in 1985. This year it is the substance of S. 12.

In the simplest way, Mr. President, it addresses the question of electronic spying in the United States carried out from diplomatic premises of various missions of various kinds within our borders.

The fact that we are at this point probably seeing the largest invasion of privacy of American citizens in their history carried out by foreign diplomats and foreign missions, including missions to the United Nations, is no longer a secret. It is a public fact.

As I mentioned in a previous exchange, Shevchenko, in his book, "Breaking With Moscow," describes in detail the facilities that were operating in Glen Cove, Long Island, about 10 years ago and which we know to have been greatly expanded since.

Last autumn, on October 7, 1984, Mr. David Burnham, of the New York Times, reported an extraordinary interview with Mr. Walter G. Deeley of the National Security Agency, the senior officer in charge of protecting Government communications.

We know in this body that the activities of the National Security Agency are very closely held affairs and its officials rarely give interviews. Mr. Deeley did. He said,

I want the country to be aware that if we do not protect our communications, it can do a great deal of damage to us. This is a problem that goes to the very fabric of our society. It is not just a worry of the National Security Agency.